done. That Order made it an offence for any alien who having been allowed to land subject to conditions acting in breach of such conditions, as well as for any person aiding and abetting any other person in contravening its provisions. Although *Regina* v. *Coney & Others* was referred to in this case, its principle was really directed, in my view, to show that, unlike other members of the audience, the appellant with full knowledge of the condition imposed on the alien deliberately encouraged a breach thereof.

Section 292 of the Penal Code deals with matters contained in the Obscene Publications Act. Whether a film can be included in the term "publication" as normally understood is another aspect to be considered. The Control of Imported Publications now defines "publication" to include "any visible representation, any recording . . . . of any cinematograph film . . . ." but the definition of the same word in the Undesirable Publications Ordinance, 1949 would appear to be narrower and limited to what is generally understood to fall within the term "publication", namely printed or written matter. If there is no offence then under the Penal Code, is there an offence under any other law?

Section 24, Cinematograph Ordinance (No. 76 of 1952) can clearly be invoked and with far less onus on the prosecution (other than proof of possession) — for the obscenity or lewdness of the film will easily be satisfied by screening it to the Court—and it will be noted that it provides for a fine not exceeding $1,000, or imprisonment not exceeding six months or both, as compared with section 292 of the Penal Code where punishment is imprisonment not exceeding three months or fine or both. The exhibitor has sufficient possession to be caught under this section, as well as a person in mere possession. Destruction or disposal will, however, require the direction of the Minister (section 24(3)).

This section, of course, cannot be invoked as against members of the audience and the two English authorities will not be of any assistance. It may, however, be relevant after a consideration whether a charge under the Theatres and Places of Public Amusement Enactment (No. 47 of 1936) would lie against the operator. "Cinematographic exhibition" is defined in section 2 but appears again only in the definition of "theatrical performance". It should have been included in my view in the definition of public amusement.

A charge under section 3 would possibly lie against the exhibitor, and following the principles of the two cases cited, it may well be that the members of the audience can be charged for abetment under section 109 of the Penal Code and section 3 of Enactment No. 47 of 1936 where it can be shown that invitation (though secret) to the public (though only a section) was made and the price paid. Having regard to the nature of the film (being absolutely prohibited under section 24 of Ordinance No. 76 of 1952), it must be clear to the audience that the exhibitor would not be in possession of a licence under the Enactment. Such licence would not be granted where any performance is of an indecent, immoral or improper nature (see section 4(iii) of Enactment No. 47 of 1936).

In my view, therefore, 'blue films' should not be charged under section 292(a), or section 109 and section 292(a), but under section 24 of Ordinance No. 76 of 1952. On the whole, I should prefer to use the audience as witnesses rather than charge them.

I therefore exercise my powers under section 325(i) of the Criminal Procedure Code (Cap. 6). I reverse the finding and sentence of the learned Magistrate and discharge the accused persons. The fines, if paid, to be refunded to the accused persons.

Finding and sentence reversed; accused discharged.

SUPPIAH v. PONNAMPALAM

[C.A. (Thomson C.J., Hill and Barakbah JJ.A.) April 15, 1963]

[Ipoh — F.M. Civil Appeal No. 56 of 1962]

Land Laws — Charge — Appellant alleging that he did not know he was signing charge — Subsequent registration of charge — Notice to pay off — Collector making Order of foreclosure and sale — Appeal — Land Code (Cap. 138), ss. 141, 142 and 237.

Evidence — Whether charge has to be proved — Compliance with section 68 of the Evidence Ordinance, 1950.

The appellant was the registered proprietor of the land in question. By a charge registered on February 20, 1953 the appellant charged his land to the respondent for $8,000. On January 12, 1959 the respondent issued a notice under section 138 of the Land Code calling on the appellant to pay off the charge. The parties and their solicitors then appeared before the Collector of Land Revenue, Larut District on February 14, 1962 for the appellant to show cause why an order of foreclosure and sale should not be made in respect of his land. The Collector after hearing the parties held that there had been default in the obligation in respect of which the charge was given and made an order of foreclosure and sale in respect of the land. The appellant appealed under section 237 of the Land Code and this appeal was dismissed. On appeal to the Court of Appeal it was argued (a) that the Collector should have accepted the appellant's story as to how he came to sign the charge and should have given effect to that acceptance by refusing to make the order he did make for foreclosure and sale, (b) that the instrument of charge was not proved because the provisions of section 68 of the Evidence Ordinance were not complied with.

Held: (1) the Collector was bound to accept the register and once he was satisfied that the charge with which he was concerned was on the register then the only question for him to decide was whether or not there had been default in the payments provided for. If he was so satisfied he was obliged to make an order under the provisions of sections 141 and 142 of the Land Code. He has no power to investigate any allegation of fraud or misrepresentation and he could not have gone beyond granting a period of delay to enable the party making the allegation to take proceedings for rectification of the register under section 240. As the appellant had ample time to take proceedings for rectification of the register

prior to the proceedings before the Collector and no such proceedings were commenced or being in contemplation the appeal should be dismissed. *Nagappa Chetty* v. *Lam Sing* (4) not followed;

(2) irrespective of whether section 68 of the Evidence Ordinance had any application at all in the case of a charge of land under the Land Code, it was not open to the appellant to raise the point for the first time on appeal. *Gopal Das* v. *Sri Thakurji* (1) followed.

Cases referred to:—

(1) *Gopal Das* v. *Sri Thakurji* A.I.R. 1943 P.C. 83, 87.
(2) *Popatlal* v. *Visandji* [1962] A.C. 715, 724.
(3) *Popatlal* v. *Visandji* [1960] E.A.C.A. 361.
(4) *Nagappa Chetty* v. *Lam Sing* 5 F.M.S.L.R. 118, 120.

COURT OF APPEAL.

N. H. Chan for the appellant.

N. Sharma for the respondent.

Thomson C.J.: The appellant in this appeal claims to be the registered proprietor and the respondent claims to be the chargee of the piece of land known as E.M.R. 1475 Lot 2259 in the District of Larut.

In 1953 the two parties had some dealings, the nature of which is in acute controversy, and in the event the appellant signed an instrument of charge under section 129 of the Land Code charging his land to the respondent as security for a loan of $8,000 purporting to have been made to him by the respondent and to be repaid, apparently without interest, on 18th February, 1958. This document, inherently improbable as are its contents, is admitted to be in the proper form; it was attested by two witnesses and was duly presented for registration and registered on 20th February, 1953. The appellant, however, says that he does not speak nor understand English, that although he signed the charge he was misled as to the nature of the document he was signing and that he certainly did not know that it was a charge of his land.

On 12th January, 1959, the respondent issued a notice under section 138 of the Land Code calling on the appellant to pay off the charge. Though this notice was received by the appellant he would appear to have taken no steps in the matter, although he did consult at least one lawyer, and nothing was done by him till 14th February, 1962, when the parties appeared before the Collector of Land Revenue for the Larut District for the appellant to show cause why an order of foreclosure and sale should not be made in respect of his land. On that occasion both parties were represented by lawyers.

Having heard the parties the Collector held there had been default in the obligation in respect of which the charge was given and made an order of foreclosure and sale in respect of the land.

Against that decision of the Collector the appellant appealed to the High Court under section 237 of the Land Code. That appeal was dismissed and he has now appealed to this Court.

It is not very easy to understand just what the appellant's grounds of appeal are but they seem to come to this: that the Collector should have accepted his story as to how he came to sign the charge and should have given effect to that acceptance by refusing to make the order he did make for foreclosure and sale.

Before coming to that question, however, it will be convenient to deal with a point which was not raised before the Collector but which was raised for the first time before Neal J.

It was there argued that although, by reason of section 141 of the Land Code, the general onus in the proceedings before the Collector admittedly lay on the appellant, nevertheless the instrument of charge was fundamental to the whole proceedings and had to be proved at some time or another and it was not proved because the provisions of section 68 of the Evidence Ordinance were not complied with.

Section 68 of the Evidence Ordinance reads as follows:—

> "If a document is required by law to be attested, it shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution, if there is an attesting witness alive and subject to the process of the Court and capable of giving evidence."

Now, irrespective of whether that section has any application at all in the case of a charge of land under the Land Code, it was not open to the appellant to raise the point for the first time on appeal. The point was thus dealt with by the Privy Council in the case of *Gopal Das* v. *Sri Thakurji* (1) in a passage which was quoted by their Lordships in the later case of *Popatlal* v. *Visandji*:— (2)

> "Where the objection to be taken is not that the document is in itself inadmissible but that the mode of proof put forward is irregular or insufficient it is essential that the objection should be taken at the trial before the document is marked as an exhibit and admitted to the record. A party cannot lie by until the case comes before a Court of Appeal and then complain for the first time of the mode of proof."

But the real question in issue before the Collector was not whether the charge produced before him had ever been executed by the appellant, or indeed by anybody at all, but whether it was the instrument of charge that had been registered and on that point the register itself was conclusive evidence by reason of section 90(ii) of the Land Code which provides that a memorial of an instrument made by the proper registering authority "shall be conclusive evidence that the instrument mentioned therein has been duly registered".

In this connection I would quote the observation of Windham J.A. in the *East African Court of Appeal* [3] which the Privy Council was able to "adopt without qualification" in the case of *Popatlal* v. *Visandji, supra,* at p. 725:—

"Any other conclusion would violate the general principle of the sanctity of the register, which is the foundation of all legislation based, ..., upon the Torrens system of registration."

Considerations of the same nature apply to the appellant's complaint that his allegations as to how he came to execute the instrument of charge were not given effect to. Once an instrument of charge is registered then by reason of section 96 the charge becomes effective for all purposes and then by reason of section 42 the title of the chargee is indefeasible unless it has been obtained by fraud or misrepresentation to which the chargee is proved to be a party or the registration has been obtained by forgery or by means of an insufficient or void instrument.

In the present proceedings, the Collector was bound to accept the register and once he was satisfied that the charge with which he was concerned was on the register then the only question for him to decide was whether or not there had been default in the payments provided for. If he was not so satisfied he could make no order. If he was so satisfied he was obliged to make an order under the provisions of sections 141 and 142. It may be, as suggested by Watson J.C. in the case of *Nagappa Chetty* v. *Lam Sing,* [4] that he had some sort of inherent power to postpone a sale if fraud or mistake was alleged. I can, however, find no power which would have enabled him to investigate any allegation of fraud or misrepresentation, and he could not have gone beyond granting a period of delay to enable the party making the allegation to take proceedings for rectification of the register under section 240.

The appellant had had ample time to take proceedings for rectification of the register, for some time prior to the proceedings before the Collector he had had legal advice and before the Collector he was legally represented. No mention of any such proceedings having been commenced or even being in contemplation was made to the Collector nor was any application for time addressed to him.

In the circumstances I would dismiss the present appeal with costs.

Hill and Barakbah JJ.A. concurred.

Appeal dismissed.

Solicitors: *Cheang Lee & Ong*; *N. Sharma.*

WONG ENG v. CHOCK MUN CHONG & ORS.

[O.C.J. (Gill J.) April 15, 1963]

[K.L. — Civil Suit No. 66 of 1962]

Tort — Motor accident — Negligence — Plea of res ipsa loquitur by plaintiff — Defendants producing evidence to show latent defect — Inevitable accident.

Practice and Procedure — Pleadings — Function of.

The first defendant, the servant of the second defendant, was driving a bus which when negotiating a left hand bend went to the right side of the road and collided with a lorry coming from the opposite direction. As a result the plaintiff, a conductor in the bus, sustained injuries and brought the present action. The defendants in reply to the plaintiff's plea of *res ipsa loquitur* produced evidence to show that while the bus was being driven round the bend the offside first wheel stub axle broke by reason of a latent defect of which neither defendants were aware and which could not be discovered by reasonable examination and that as a result the first defendant was unable to control the bus. The bus was regularly serviced and repaired but on the day before the accident the first defendant had discovered that the bus moved to the right when the brakes were applied and that just before the accident there were some slips at the steering which were not serious.

In the particulars of negligence the plaintiff alleged that the first defendant (a) drove the bus to the wrong side of the road; (b) failed to apply his brakes effectively, (c) failed to exercise due care and skill in the management of the bus and (d) failed to take any or adequate precaution in driving the bus. The plaintiff did not allege that the bus was unroadworthy at the time of the accident.

Held: (1) the collision was caused by an inevitable accident;

(2) on the pleadings and in the light of the evidence the defendants cannot be held responsible merely because they did not negative some possible case which had never been alleged against them in the pleadings or made against them in the course of the trial.

Cases referred to:—

(1) *Scott* v. *London Dock Co.* (1865) 3 H. & C. 596.
(2) *Russell* v. *London & South-Western Railway Co.* (1908) 24 T.L.R. 548.
(3) *Tan Giok Hue* v. *Lim Swee Peng* [1960] M.L.J. 190.
(4) *The Marpesia* (1872) L.R. 4 P.C. 212.
(5) *The Merchant Prince* [1892] P. 179, 190.
(6) *The Schwan* [1892] P. 419, 434.
(7) *Esso Petroleum Co. Ltd.* v. *Southport Corporation* [1955] 3 All E.R. 864.
(8) *Winnipeg Electric Co.* v. *Jacob Geel* [1932] A.C. 690.
(9) *Phillips* v. *Britannia Hydraulic Laundry Co. Ltd.* [1923] 2 K.B. 832.

ACTION.

Kam Koon Wah for the plaintiff.

N. A. Marjoribanks for the defendants.

Cur. Adv. Vult.

Gill J.: This is an action for damages for personal injuries sustained by the plaintiff as a result of a collision between motor bus BC 6887 and a motor lorry. The plaintiff was the conductor and the first and second defendants were the driver and owners respectively of the motor bus at the time of the accident.

There is no dispute about any of the material facts relating to the collision and they are relatively simple. The collision took place on the 13th August, 1961 at about 8.30 a.m. at the